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No. 96-1020

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

BOARD OF EDUCATION OF PLAINVIEW-OLD BETHPAGE CENTRAL SCHOOL DISTRICT and EDWARD METZENDORF,

Petitioners,

vs.

LINDA DONATO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

The questions as framed by the Petitioners misstate the grounds for the decision by the United States Court of Appeals for the Second Circuit. The Petition for the Writ of Certiorari attempts to distort the well-established legal precedents of this Court on the issue of liberty rights under the Fourteenth Amendment and seeks to impose arbitrary limitations on those holdings. The questions presented for review to this Court, therefore, are more properly stated as follows:

1. Whether a probationary public employee is entitled to a pre-termination name-clearing hearing where, under state law, the reasons for discharge are required to be furnished to the employee and where those reasons contain stigmatizing accusations of professional incompetence and reflect on the employee's professional competence, good name and integrity so as to foreclose her ability to gain future employment in her chosen profession, thereby implicating and depriving her of a liberty right under the Fourteenth Amendment.

2. Whether inclusion of stigmatizing charges for termination in a public employee's personnel file constitutes disclosure of the charges against her, necessitating a pre-termination name-clearing hearing.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent respectfully opposes the Petition for a Writ of Certiorari on the ground that the opinion of the United States Court of Appeals for the Second Circuit is not in conflict with decisions of other Circuit Courts but rather, is fully consistent with the prior decisions of this Court as well as other Circuit Courts. In reality, the opinion of the Second Circuit concerns the application of the relevant facts of this case to existing legal precedent. For the convenience of the Court, all citations

to the opinion will be to the opinion attached as Appendix A to the petition.

STATEMENT OF THE CASE

A. The Parties In This Case

The Respondent, Linda Donato (hereinafter referred to as "Donato"), had been continuously employed by the Petitioner, Plainview-Old Bethpage Central School District (hereinafter, the "School District") for twenty-eight years, as a teacher, Chairperson of the Social Studies Department and as an Assistant Principal. The other Petitioner, Edward Metzendorf (hereinafter "Metzendorf") was Donato's immediate supervisor and her Principal during the school years, 1991-1992 and 1992-1993, the critical period of this litigation.

B. Prior Litigations

In 1978, Donato, as the lead plaintiff, and a number of other female teachers commenced a lawsuit against the School District under the Civil Rights Act of 1964, as amended. That action sought to remedy certain acts of discrimination on the basis of sex, pertaining to the School District's mandatory maternity leave policy which was then in effect. As a consequence of that unlawful maternity leave policy, those female teachers were in danger of losing their jobs because of the denial of their seniority credits while on forced maternity leave. In addition, those teachers had been denied other benefits that were due them, such as salary step increases, sick leave and retirement credits.

That prior action eventually resulted in the parties entering into a Settlement Agreement and a Judgment was accordingly entered on February 26, 1982. Under the express terms of the Settlement Agreement, the School District was prohibited from acts of retaliation or harassment against Donato and the other plaintiffs by virtue of enforcing their constitutional rights.

Thereafter, the teachers eventually were granted all the relief awarded to them under the terms of the Stipulation of

Settlement and the Judgment with the exception of retirement credits. In order to afford those teachers their appropriate retirement credits, the School District was required to pay into the Retirement System, the sum of approximately $84,000.00, at that time. The School District then tendered the check but the Retirement System rejected it and refused to award retirement credits on the technical ground that the teachers were not actually working during the periods of forced maternity leave.

Rather than being faced with the possibility of more protracted litigation, the teachers obtained passage of a special bill in the New York State Legislature which (1) directed the New York State Teachers' Retirement System to grant the appropriate retirement credits awarded to them under the Judgment, and (2) directed the School District to pay to the New York State Teachers' Retirement System the amount determined to be necessary to implement the relief. However, because of the ensuing lapse of almost seven years from the date of the Judgment (February, 1982) to the date contained in the special statute (June 30, 1989), the amount required to be paid to the Retirement System had increased from $84,000.00, to approximately $225,000.00.

The School District paid the amount required in 1989 and the teachers finally received their appropriate retirement credits. However, this did not end the matter but only spawned a second litigation.

The School District then commenced a lawsuit in the New York State Supreme Court in Albany, New York, against Donato and her fellow teachers seeking to set aside the special statute on constitutional grounds but that challenge was dismissed, upon Donato's motion, on December 21, 1989.

C. Factual Background For Present Litigation

In August of 1991, Donato was selected for the position of Assistant Principal in the School District and was given a three year probationary contract under New York State Education Law, which would have made her eligible for tenure

consideration in this new tenure area three years later (September 1, 1994).

In or about July of 1992, at the end of her first year as Assistant Principal, Donato began to experience a discriminatory and retaliatory pattern of conduct developing towards her. Then, on or about September 23, 1992, Donato was told by Metzendorf, that he had been directed by certain individuals in the School District to create a negative record regarding her work performance for further adverse action. Metzendorf stated that he had to "put things in writing" about Donato or suffer consequences to his own career and furthermore, that if he failed to do as instructed, they would "chop my legs off" (A-5).

Following this warning, Metzendorf prepared two bimonthly evaluations of Donato containing negative statements which were either untrue or contained gross distortions of fact. These reports, although vehemently disputed by Donato in writing, apparently were concocted to provide the purported factual basis upon which the School District would seek to terminate her employment.

D. Proceedings in the District Court

Anticipating further adverse actions by the School District, Donato commenced this lawsuit in the United States District Court (E.D.N.Y.) on March 30, 1993, by the filing of a Verified Complaint. The complaint sought to enforce the terms of the prior Judgment of the District Court, entered on February 26, 1982, and to punish the Petitioners for violation of the express terms of that Judgment which prohibited any acts of retaliation against her.

Subsequent to the filing of the complaint, the School District informed Donato of its decision to terminate her employment as a probationary Assistant Principal after twenty-eight years of service in the School District and without affording her a hearing. As a result of the termination of Donato's employment, an Amended Complaint was filed on May 27, 1993, adding a Second Cause of Action alleging that

this termination, without a hearing, constituted a separate violation of Donato's constitutional rights to due process of law under the Fourteenth Amendment.

In the course of the litigation in the District Court, Donato moved for summary judgment on the second cause of action set forth in her Amended Complaint, namely her constitutional right to a pre-termination hearing prior to actual discharge. Following oral argument on that motion, the District Court Judge on July 21, 1994, without opinion, orally denied that motion and upon the Court's own motion, dismissed the second cause of action contained in the Amended Complaint.

The case was then tried without a jury on the remaining cause of action contained in the Amended Complaint, seeking monetary damages and injunctive relief based on the claim of retaliation. At the end of Donato's case, the District Court granted the Petitioners' motion and dismissed the complaint on the ground that Donato failed to establish a *prima facie* case of retaliation. Judgment was accordingly entered and Donato filed an appeal to the United States Court of Appeals for the Second Circuit.

E. The Second Circuit Opinion

The United States Court of Appeals for the Second Circuit, in its opinion dated September 24, 1996, affirmed the dismissal of the retaliation claim (A-17 to A-19) and the claim to a constitutionally protected property right (A-8 to A-11). The Second circuit however, reversed the District Court with respect to Donato's claim that her discharge, without a pre-termination hearing, deprived her of a liberty right without due process of law (A-11 to A-17). The Circuit Court held that the stigmatizing charges leveled against Donato as the reason for termination, reads like a bill of indictment so as to preclude her from any future employment in her profession. Furthermore, the Circuit Court determined that the placement of those stigmatizing charges in her personnel file constitutes public disclosure so as to implicate a liberty interest (A-13 to A-16).

F. Corrections of Misstatements in the Petition

The opinion of the Court of Appeals correctly sets forth the facts of this case. However, pursuant to United States Supreme Court Rule 15.2, Donato brings the following misstatements of fact contained in the petition to the Court's attention.

Petitioners claim that at the end of the 1991-1992 school year, following an end of the year evaluation by Metzendorf, the School District "conditionally rehired" Donato (Petition, p.6), but as the opinion correctly characterized that evaluation, Metzendorf, while referring to many positive aspects of Donato's performance, conditionally recommended continuing her probationary status (A-4).

Donato also disputes the Petitioners' contention that she was provided with oral evaluations of her performance, together with suggested methods of improvement. Quite to the contrary, the trial testimony of Donato was that Metzendorf refused to discuss her performance and was never given any suggestions for improvement, as indeed, none were necessary.

Finally, Petitioners claim that following Donato's termination of employment by the Board of Education on May 17, 1993, she did not exercise her right to challenge her discharge under state law (Petition, p.7). This again misstates the correct facts. Donato had already commenced her lawsuit in the District Court on March 30, 1993, two months earlier. Following her termination, Donato was granted permission to file an Amended Complaint on May 27, 1993, to add the additional cause of action claiming violation of her constitutional rights under the Due Process Clause of the Fourteenth Amendment.

REASONS FOR DENYING THE WRIT

I

The Decision Of The Second Circuit Is Consistent With The Various Decisions Of This Court And Other Federal And State Court Decisions

A. Liberty Interests Under The Fourteenth Amendment

Contrary to the School District's argument that the Second Circuit's opinion has created a split in the circuits, Donato contends that the decision in this case is fully consistent with prior determinations of the United States Supreme Court and other circuits, as well as prior Second Circuit decisions, which have addressed the Fourteenth Amendment's "liberty interest". See: *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971); *Huntley v. Community School Board*, 543 F.2d 979 (2d Cir. 1976), *cert. denied*, 430 U.S. 929 (1977).

It is well-settled that liberty rights are implicated when governmental action (a) threatens an employee's good name, reputation, honor, or integrity or (b) imposes a stigma or other disability which forecloses a discharged employee's freedom to take advantage of employment opportunities. *Board of Regents v. Roth, supra; Wisconsin v. Constantineau, supra; Brandt v. Board of Cooperative Educational Services*, 820 F.2d 41 (2nd Cir. 1987); *McNeil v. Butz*, 480 F.2d 314 (4th Cir. 1973).

Petitioners make the absurd argument that the opinion of the Second Circuit somehow imposes a conflict between the judicial precedents set forth above and New York State Education Law, Section 3031, relating to probationary employees. Petitioners argue that school districts will now be compelled to chose between giving a discharged employee the reasons for termination and affording such employee a due process hearing if those reasons are stigmatizing. Donato contends that no such constitutional conflict exists.

There can be no dispute that school districts must comply with appropriate state law. In the vast majority of cases where reasons for termination are requested and subsequently provided to a discharged employee, no name-clearing hearing would be required where those reasons are not stigmatizing so as to preclude future employment or where the employee does not dispute the truth of those reasons. *Codd v. Velger*, 429 U.S. 624 (1977). However, where the reasons for discharge are stigmatizing and disputed, a name-clearing hearing must be afforded the employee. In such cases, where reasons are provided to support the termination of a public employee, an opportunity must be provided in order to determine whether the discharge on the ground stated is the real one or merely a pretext. Thus, there is no inherent conflict between the Second Circuit's opinion and Section 3031 of New York State's Education Law.

There can be no doubt as to the stigmatizing effect upon Donato regarding the reasons for her termination. The Superintendent of the School District has set forth no less that nine (9) separate reasons ranging from poor work performance as an administrator, poor staff relations, ineffective parent interaction and inadequate instructional supervision, to a charge of personality problems, including inability to accept criticism and concluding with a "catch-all" category of ineffective commitment to her employer. Certainly, the totality of all these alleged reasons culminates in a serious charge which certainly stigmatizes Donato and reflects negatively on her good name, reputation and integrity as a teacher and administrator which she had acquired over twenty-eight years of service to the School District as, indeed, the Circuit Court so found (A-13). See *Huntley v. Community School Board, supra.*

Petitioners can draw no support for their reliance on *Lutwin v. Alleyne*, 58 N.Y.2d 889 (1983), as that case is factually distinguishable. In that case, a charge of poor administrative and supervisory abilities against a discharged community board manager was held not to be stigmatizing since that reason alone, was held not to implicate her good name, reputation,

honor or integrity and therefore, did not require a name-clearing hearing.

B. Public Disclosure

The Second Circuit opinion correctly recognized that for the stigmatizing charges against a public employee to implicate a liberty interest under the Fourteenth Amendment, there must be public disclosure. *Bishop v. Wood*, 426 U.S. 341, 348 (1976). Furthermore, it is also equally well-settled by various federal courts that where the stigmatizing charges are placed in the discharged employee's file, this constitutes public disclosure warranting a due process hearing prior to any discharge. *Brandt v. Board of Co-Op Educational Services, supra; Velger v. Cawley*, 525 F. 2d 334 (2nd Cir. 1975), *reversed on other grounds sub nom., Codd v. Velger*, 429 U.S. 624 (1977); *Valmonte v. Bane*, 18 F.3d 992 (2nd Cir. 1994); *Doe v. United States Dept. of Justice*, 753 F. 2d 1092, 1113 n. 24 (D.C. Cir. 1985); *Burris v. Willis Indep. School Dist., Inc.*, 713 F.2d 1087 (5th Cir. 1983). Moreover, there is no requirement that Donato, prior to the hearing, demonstrate that the charges are false; she merely has only to assert that they are false. *Codd v. Velger, supra.*

Additionally, various courts have also held that where the reasons for an individual's termination would likely be communicated to a prospective employer, the discharged employee is entitled to a hearing under the Fourteenth Amendment. *Ledford v. Delancey*, 612 F. 2d 883, 886 (4th Cir. 1980); *Clark v. Mann*, 562 F. 2d 1104, 1116 (8th Cir. 1977); *Churchwell v. United States*, 545 F. 2d 59, 62 (8th Cir. 1976); *Cato v. Collins*, 539 F. 2d 656, 660 (8th Cir. 1976); *Buhr v. Buffalo Public School District No. 38*, 509 F. 2d 1196, 1199 (8th Cir. 1974).

Petitioners, in their petition for the writ of certiorari, improperly make reference to an affidavit of a former Superintendent in the School District (filed after the Second Circuit opinion and in support of their motion for a stay of the mandate), to support their premise that there must be proof of actual disclosure of Donato's personnel file (See petition, p.12).

In the first place, that affidavit was not part of the record before the Second Circuit when it considered the merits on appeal and should not be considered by this Court. Secondly, that affidavit is of no consequence because it readily admits that disclosure of an employee's file is "treated on a case-by-case basis" and therefore does not preclude future disclosure. Furthermore, the Superintendent's affidavit does not deny that *any information*, whether in substance or orally, relating to Donato's discharge was communicated to a prospective employer. Lastly, as the Second Circuit correctly observed:

> Potential future employers undoubtedly will consult plaintiff's prior employer when she applies for supervisory positions. See *Velger*, 525 F.2d at 336 (job applicants usually required to disclose personnel files to prospective employers.) (A-14).

Thus, for the reasons set forth above, the opinion of the Second Circuit is not in conflict with other federal circuits or state courts and, in fact, is fully consistent with prior decisions of this Court and other federal circuits.

II

The Reasons For Donato's Discharge Constitute Stigmatizing Charges And The Opinion Of The Circuit Court Is Not In Conflict With Decisions Of Other Circuit Courts

Petitioners argue, that in order for the reasons for an employee's discharge to be considered "stigmatizing", those charges must involve either moral turpitude or character deficiencies (Petition, p.15). This argument is clearly incorrect, contrary to judicial precedent and demonstrates a myopic view of the various decisions which have considered the Fourteenth Amendment's liberty interest.

To the contrary, dismissal from public employment implicates a liberty interest warranting a name-clearing hearing where the dismissal is for dishonesty, moral turpitude or *some other reason bearing such stigma as might foreclose other employment opportunities* (emphasis added). *Hayes v.*

Phoenix-Talent School District No. 4, 893 F.2d 235 (9th Cir. 1990). It is also clear that defamatory statements about a public employee, together with termination of that employment or deprivation of some other legal right or status, implicates a liberty interest requiring a due process hearing (the so-called "stigma plus" test). *Paul v. Davis*, 424 U.S. 693 (1976); *Neu v. Corcoran*, 869 F.2d 662 (2nd Cir. 1989), *cert. denied*, 493 U.S. 816 (1989); *Valmonte v. Bane*, *supra; Colaizzi v. Walker*, 542 F.2d 969 (7th Cir. 1976), *cert. denied*, 430 U.S. 960 (1977); *White v. Thomas*, 660 F.2d 680 (5th Cir. 1981), *cert. denied*, 455 U.S. 1027 (1982).

In reaching its determination that the reasons for Donato's dismissal constituted a stigma against her *and* foreclosed future employment, the Second Circuit correctly observed that termination from public employment on the grounds of incompetence or because she can no longer perform her job is considerably graver than merely poor performance and carries more potential for future disqualification from employment. *O'Neill v. City of Auburn*, 23 F.3d 685, 692 (2nd Cir. 1994). In this regard, the Circuit Court correctly determined that:

> Yet, even governmental allegations of professional incompetence do not implicate a liberty interest in every instance. Such allegations will support a right to a name-clearing hearing only when they denigrate the employee's competence as a professional and impugne the employee's professional reputation in such a fashion as to effectively put a significant roadblock in that employee's continued ability to practice his or her profession. (citing *Huntley v. Community School Board, supra.)* (A-12)

The Second Circuit then, considering the totality of all the reasons given for her discharge, properly concluded that "... the comments in the instant case are so harsh as to be likely to persuade any other school board not to hire plaintiff as a supervisor" (A-13). Such a factual determination should not warrant reconsideration by this Court.

Lastly, Petitioners set forth a list of statements for discharge that they claim have been held to be non-stigmatizing (A16 to A17). However, a reading of those cases clearly demonstrates that Petitioners' attempt to classify various statements into categories, without regard to the facts of each case, is contrary to judicial precedent, without support and myopic in its approach. Furthermore, the cases relied upon by Petitioners do not support their contention, are factually distinguishable, and not in conflict with the Second Circuit's opinion in this case. Each of those categories and the cases relied upon is discussed as follows:

1. *Uncooperative attitude - Laborde v. Franklin Parish School Board*, 510 F.2d 590 (5th Cir. 1975), is factually distinguishable because there, the Court held that such reason is no more than a reflection of dissatisfaction with teaching methods and also there was no public disclosure. *Jeffries v. Turkey Run Consolidated School Dist.*, 492 F.2d 1 (7th Cir. 1974) is also distinguishable as there was no claim of a constitutional deprivation but only that the reasons for termination were arbitrary and capricious and further, there was no right under state law that reasons be given. *Raposa v. Meade School Dist. 46-1*, 790 F.2d 1349 (8th Cir. 1986) concerned only a job transfer and not termination of employment and/or the loss of salary. *Stretten v. Wadsworth Veterans Hosp.*, 537 F.2d 361 (9th Cir. 1976), although upholding the discharge of a doctor for incompetence, implied that he is not foreclosed from other employment in his profession and then stated in a footnote that a label which would prevent an individual from practicing his or her chosen profession at all, may have consequences so severe that liberty would be infringed. (537 F.2d p.366, n13).

2. *Insubordination* - Irrelevant as no charge of insubordination was made against Donato.

3. *Failure to Coordinate With Another Employee* - In *Shirck v. Thomas*, 486 F.2d 691 (7th Cir. 1973) there was no public disclosure and the Court there determined that where the reasons for discharge made an employee less attractive to

future employers *but did not foreclose her ability to gain other employment*, she was not entitled to a hearing.

4. *Use of Unprofessional Language* - Factually irrelevant as to Donato.

5. *Use of Harsh Discipline* - Factually irrelevant as to Donato.

6. *Improper or Substandard Job Performance - Norbeck v. Davenport Community School Dist.*, 545 F.2d 63 (8th Cir. 1976) held that discharge for conflict of interest evidences only poor judgment and does not prevent future employment. *Roley v. Pierce County Fire Protection Dist. No. 4*, 869 F.2d 491 (9th Cir. 1989), concerned the discharge of a Fire-Chief for what amounted to a lack of confidence and inability to get along with others but, there, the Court also held that it would distinguish between allegations that may reduce economic rewards and diminish prestige from those statements that may preclude one permanently from their profession (869 F.2d, 496), and in that case, the discharged employee had only asserted that his reputation had been damaged, not that he had been permanently precluded from other employment as a fire-chief. *Paige v. Harris*, 584 F.2d 178 (7th Cir. 1978) concerned the discharge of a government attorney but that Court held only that a discharge for less than acceptable performance does not preclude employment as a lawyer.

7. *Failure To Maintain Discipline - Smith v. Bd. of Education of Urbana School Dist. No. 116*, 708 F.2d 258 (7th Cir. 1983), concerned two physical education teachers who, *while retaining their teaching jobs*, were terminated from their respective positions as head coaches of athletic teams on the grounds that it would be good for the school's athletic programs as well as for problems with discipline. That Court held that if the statements had been made public and were so critical of the plaintiffs' coaching abilities that it would be virtually impossible for them to find new employment in similar coaching positions or that people in the community would no longer associate with them, then they would have a right to a hearing.

8. *Incompetence - Hayes v. Phoenix-Talent School Dist. No. 4, supra*, concerned the discharge of a probationary principal, but, as previously discussed, the Ninth Circuit held that dismissal from public employment implicates a liberty interest if the dismissal is for dishonesty, moral turpitude or some other reason bearing such stigma as might foreclose other employment opportunities.

Thus, it is clear that the list of cases relied upon by Petitioners fails to support their position and, in fact, demonstrates that there is no split among the circuit courts. Furthermore, various other circuit courts have granted name-clearing hearings for some of the similar reasons given for Donato's discharge.

In *Wells v. Doland*, 711 F.2d 670 (5th Cir. 1983), the Fifth Circuit remanded the case to the lower court suggesting that an assistant professor, whose contract was not renewed, was entitled to a name-clearing hearing based upon charges of incompetence as a teacher, lack of leadership and poor reputation.

In *Burkhart v. Randles*, 764 F.2d 1196 (6th Cir. 1985), the Sixth Circuit determined that the discharge of a deputy clerk for alleged poor work performance and for failure to get along with others, implicates a liberty interest, necessitating a name-clearing hearing.

Finally, the Seventh Circuit, in *Hostrop v. Board of Junior College Dist. No. 515*, 471 F.2d 488 (7th Cir. 1972), held that the termination of a college president, accused of misrepresentation, constituted an attack on his veracity, thereby implicating a liberty right so as to require a name-clearing hearing.

Consequently, it is beyond dispute that the opinion of the Second Circuit is consistent with judicial precedent and not in conflict with other circuits. As the Second Circuit stated, the presence or absence of a literal charge of incompetence is not dispositive of a liberty interest, but rather, the Court must look to the substance of the statements as a whole (A-16). Where the *totality* of the charges against Donato are

stigmatizing and result in her termination from public employment so as to preclude future employment in her profession, a liberty interest is implicated, warranting a name-clearing hearing.

CONCLUSION

For the reasons stated herein, it is respectfully requested that the writ of certiorari be denied.

Respectfully submitted,

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